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24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **OAKLAND DIVISION**

27 EPIC GAMES, INC.,

28 Plaintiff, Counter-defendant,

v.

APPLE INC.,

Defendant, Counterclaimant.

Case No. 4:20-CV-05640-YGR-TSH

JOINT STATUS REPORT RE
SPECIAL MASTER REVIEW

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

1 Pursuant to the Standing Order for All Judges of the Northern District of California, Civil
 2 Local Rule 16-9, the Court's Standing Order in Civil Cases, and the Court's Minute Entry of
 3 January 14, 2025 (Dkt. 1117), Plaintiff and Counter-defendant Epic Games, Inc. ("Epic"), and
 4 Defendant and Counterclaimant Apple Inc. ("Apple"; Apple and Epic together, the "Parties," and
 5 each individually, a "Party"), by and through their undersigned counsel, hereby submit this Joint
 6 Status Report Re Special Master Review.

7 **EPIC'S STATEMENT:**

8 Despite this Court's Order on May 31, 2024, requiring Apple to produce "all of Apple's
 9 documents relative to the decision-making process leading to the link entitlement and associated
 10 commission rates" (Dkt. 974), Apple initially withheld around 55,000 documents for privilege
 11 after producing just under 100,000 documents to Epic. Epic raised concerns about this
 12 exceedingly high privilege withholding rate, and those concerns were well founded—as a result
 13 of its re-review process, Apple withdrew well over half of its privilege claims (30,104 out of
 14 53,820), downgrading almost 56% of its withheld documents and conceding that those are
 15 entirely *not* privileged.

16 By January 14, the last time the Parties appeared before the Court, Apple's weekly
 17 privilege downgrade rates clearly showed that Apple had been abusing privilege, thereby delaying
 18 the contempt proceedings against it for months. Therefore, and to avoid further delay, Epic asked
 19 this Court to stop Apple's re-review process and sanction Apple by holding that it waived its
 20 privilege through its massive campaign of over-withholding. At the time, although the Court
 21 recognized that Apple's privilege review was "in large part . . . delay" and "totally a tactic", the
 22 Court declined Epic's invitation. (Jan. 14, 2025 Case Mgmt. Conf. Tr. 23:20-24.)

23 Instead, the Court ordered the Parties to report back on the progress of the Special
 24 Masters' review as of the end of January, stating that, at that point, and to avoid further delay, the
 25 Court may halt that process and itself re-review a selection of the documents yet to be ruled upon
 26 by the Special Masters as a "backstop". (Jan. 14, 2025 Case Mgmt. Conf. Tr. 23:12-16.) The
 27 Court further warned Apple that there would "be consequences for the choices that [Apple]
 28 made". (Jan. 14, 2025 Case Mgmt. Conf. Tr. 23:25-24:1.)

Epic accordingly provides the Court with an update. Specifically, as of last night, after nearly six weeks of review, the Special Masters have reviewed roughly 5,500 documents. But while the rate of Special Master review has increased significantly, there are still over **18,000** documents left for their review as of today. This is partly because, since January 14, Apple doubled down on its delay and abuse tactics: in the days immediately following the last status conference, Apple funneled many more documents than before to the Special Masters, including many that appear to be the most core documents in this case, knowing full well that the Special Masters would be unlikely to get to review these documents and adjudicate Apple's privilege assertions. Apple thus once again created for itself a win-win situation: either Epic is denied the documents it is entitled to, or Apple's day of reckoning is again delayed by many months. To break this logjam, Epic again asks the Court to sanction Apple and find that it has waived privilege over the documents the Special Masters have yet to review.¹

13 * * *

14 On January 13, Apple told the Special Masters that it estimated they would have
15 “somewhere in the neighborhood of 16 or 17 [thousand documents] across all the privilege
16 productions from the beginning until the end”. (Jan. 13, 2025 Special Master Conf. Tr. 79:12-15,
17 80:12-23.) The next day, when the parties were last before this Court, Apple represented that it
18 had already identified 17,998 documents over which it was maintaining its privilege assertions,
19 with 9,920 left to re-review for privilege. (Jan. 14, 2025 Case Mgmt. Conf. 13:20-23). This
20 Court made clear it will not defer the resumption of the hearings by months, which Apple knew it
21 could exploit, as the Special Masters will not get the chance to review superfluous documents
22 Apple sent their way. Accordingly, three days later, the number of documents over which Apple
23 maintained an assertion of privilege had climbed to 23,716 (by Apple’s own count). (Email from
24 J. Wesneski to Epic counsel on Jan. 22, 2025 at 11:17 a.m. PST.)

¹ Apple complains of “prejudice”, but Epic’s position is neither new or surprising. The Parties just last night filed a Joint Status Report with Judge Hixson where Epic raised the very same concerns. And Epic’s renewed request for sanctions is hardly surprising in light of those concerns.

In the final four days of re-review, then, the universe of documents over which Apple maintained a claim of privilege increased by over 40%.² For the sake of comparison, Apple's January 13 estimate reflected an expected downgrade rate of nearly 70%; yet in the last four days of its re-review, Apple's downgrade rate declined to roughly 42%, far below its rate in the preceding four weeks.³

The Special Masters expressed concern at the January 13 Status Conference that they may only be able to review 300-400 documents each per week (900-1,200 per week collectively). Apple's astounding final production over the following week made them "really concerned about the timing" of concluding their review. (Jan. 24, 2025 Special Master Conf. 8:15-16.) Although the Special Masters' rate of review has increased over the past two weeks, their current pace suggests their review would not be complete until April at the earliest.

Apple did not just drastically reduce its *rate* of downgrades in the final days of the re-review process. Although Apple represented that its re-review process was based on a “random selection” of documents (Dec. 20, 2024 Discovery Hearing at 5:12-16), the *kinds* of documents Apple produced to the Special Masters in the last week of its re-review raises serious concerns that this was not the case. Specifically, it appears that Apple waited until the final days of its re-review to produce to the Special Masters the bulk of the documents that are most likely to be relevant to the upcoming contempt proceedings. Take, for example, three of Apple’s key witnesses in the contempt proceedings: Carson Oliver, Alex Roman and Phil Schiller. 72% of all assertedly privileged documents for which Mr. Oliver is a custodian were produced to the Special Masters in the final production; for Mr. Roman, 68.7%; and for Mr. Schiller, just over 60%. All

² As one Special Master noted, “[t]he fifth production alone is more than the first four combined”. (Jan. 24, 2025 Special Master Conf. 8:9-11.)

³ Apple's overall downgrade rate is roughly 56%—still remarkably high, but far lower than the 70% Apple predicted just five days before completing its re-review.

1 of these documents are documents Apple knew the Special Masters are unlikely to have the
 2 chance to review—and Epic would thus be unable to use in the upcoming hearings.⁴

3 Epic believes Apple’s declining privilege downgrading rates have a singular reason: with
 4 the knowledge that its latest privilege assertions will not be reviewed by the Special Masters,
 5 Apple once again engaged in over-withholding, maintaining privilege assertions over a large
 6 number of documents that simply are not privileged. Consider just three examples:⁵

- 7 • Entry No. 1470 in Apple’s final privilege log, PRIV-APL-EG_00162498, is a
 8 January 6, 2024 presentation, with the file name “Wisconsin”—Apple’s codename
 9 for its Injunction compliance project. The custodians of this presentation are Mr.
 10 Oliver and Ms. Thai—both non-lawyers. Apple seeks to withhold this presentation
 11 *in its entirety*, yet its privilege log does not name a single lawyer involved in its
 12 preparation; rather, it simply asserts the presentation “reflect[s] advice from Apple
 13 legal”.
- 14 • Entry No. 4706, PRIV-APL-EG_00197353, is an email from Mr. Schiller to Fred
 15 Sainz, an Apple communications person, and to Kate Adams, Apple’s General
 16 Counsel, copying multiple business executives, communications personnel and
 17 attorneys. The email subject is “Re: HOT: White paper on DMA Privacy/Security
 18 Protections”. Nothing in the privilege log suggests the communication is legal in
 19 nature, let alone that it is made primarily to obtain legal advice. To the contrary,
 20 this appears to be an email concerning primarily Apple’s communications and
 21 public relations policy—the kind of communication this Court already had
 22 admonished Apple for trying to keep under wraps.

23
 24
 25 ⁴ Apple suggests this is the result of the fact it reviewed more documents in the final week of
 26 its re-review. But that does not explain the far lower rate of *downgrading* in the final days of the
 27 re-review.

28 ⁵ Apple now claims one of these documents is privileged in “substantial majority”, and
 another is one that Apple would have produced had it been asked. But Apple reviewed these
 documents twice over and decided to seek to withhold them *in their entirety*.

1 • Entry No. 7796, PRIV-APL-EG_00226492, is a May 2023 presentation with the
 2 file name “Wisconsin Scenarios and Financial Impacts”. Apple seeks to withhold
 3 this presentation in its entirety, but its privilege log again does not list a single
 4 lawyer involved in its preparation; its custodians are Apple business executives
 5 and employees, including Messrs. Schiller, Oliver, Federighi and others; and its
 6 name suggests it is, at least in large part, a business presentation.

7 These examples are just the tip of the iceberg; Apple’s latest privilege log is replete with
 8 documents whose descriptions suggest they are substantive, relevant and *not* privileged. To
 9 further make this point, even without access to the underlying purportedly privileged documents,
 10 Epic encloses herewith, as **Exhibit A**, a list of 100 exemplar documents over which Apple
 11 maintained its privilege assertions but that Epic believes are substantive documents that are
 12 unlikely to be privileged. Should the Court decide to “spot check” Apple’s privilege assertions,
 13 as it warned Apple it might do (Jan. 14, 2025 Case Mgmt. Conf. Tr. 23:1-4), Epic respectfully
 14 suggests that the Court include review of these documents.⁶ And, as noted above, Epic again
 15 requests the Court sanction Apple for its ongoing abuse of privilege. Apple was on notice that its
 16 conduct may result in sanctions; enough is enough.

17 **APPLE’S STATEMENT:**

18 ***Numbers Requested by the Court***

19 Apple completed its production of documents to the Special Masters and Epic last week.
 20 On January 22, Apple provided the following metrics to Epic regarding the re-review:
 21

22 **Total documents re-reviewed: 53,820**

23 **Categories**

24 **Category 1: 22,658**

25 **Category 2: 7,059**

26
 27 ⁶ Apple’s suggestion that the way to address these documents is through the Protocol misses
 28 the point; the Protocol would result in months of further delay before Epic received documents it
 was entitled to obtain **by September 30, 2024**.

1 **Category 3:** 24,103

2 **Privilege assertions**

3 **Documents tagged “Not Privileged”:** 30,104

4 **Documents tagged “Privileged”:** 23,716

5 Out of the 53,820 documents reviewed, Apple downgraded approximately 55.9%.
6 Excluding those downgrades that Apple contends were a result of Judge Hixson’s December 2
7 discovery order (i.e., the Category 2 documents), the downgrade percentage is approximately
8 42.1%.⁷
9

10 The following metrics represent the Special Masters’ progress as of the evening of January
11 30:

12 **Documents Ruled On:** 5,506

13 **Privilege Upheld in Full:** 4,906 (89.1%)

14 **Privilege Upheld in Part, Overruled in Part:** 46 (0.8%)

15 **Privileged Overruled in Full:** 554 (10.1%)

16 **Requests for Additional Information:** 89

17 The Special Masters estimated in early January that they would be able to collectively
18 review approximately 1,000 documents in total per week. In the two weeks since then, the Special
19 Masters have collectively exceeded that pace. Nevertheless, at a status conference on January 24,
20 the Special Masters estimated that it will take them “at a minimum” through February or March to
21 complete their review. *See Hr’g Tr. 10:8–13, 12:11–14 (Jan. 24, 2025).*

22
23 **Epic’s Submission**

24
25
26 ⁷ It is not accurate, as Epic contends, that Apple has “conced[ed]” that all of the downgraded
27 documents are not privileged—Apple reserved all rights as to the documents identified in Category
28 2, which Apple maintains are privileged but acknowledges are affected by Judge Hixson’s and this
Court’s orders in this case.

1 The Court requested in this joint update the “numbers” for the review undertaken so far.
 2 Hr’g Tr. 24:22 (Jan. 14, 2025). It did not ask for any other update from the parties. Fewer than
 3 five hours before this joint submission was due, Epic provided its draft joint submission to Apple
 4 for the first time (after unilaterally delaying the exchange scheduled for the previous night), which
 5 includes far more than a discussion of “numbers” and instead addresses documents and issues never
 6 before raised to Apple. And Epic’s initial account of the “numbers”—the only thing the Court
 7 actually requested—in its joint submission was off *by thousands of documents*. Only after Apple
 8 pointed this out did Epic correct the admitted “error.”
 9

10 Epic’s submission also included reference to an Exhibit A of some 100 documents. Epic
 11 has never raised these particular documents to Apple before *and did not provide this list to Apple*
 12 *until 10:20 AM PT*. This course of conduct is not consistent with the spirit of a joint statement
 13 exchange, and is highly prejudicial to Apple. That is particularly so given that the review Protocol,
 14 which has been entered as an order by this Court, provides a mechanism for either party to object
 15 to privilege determinations regarding particular documents. *See* Dkt. 1092 ¶ 4. Nevertheless,
 16 Apple provides here its responses to Epic’s arguments in the most complete form possible in this
 17 truncated timeframe while reserving the right to respond more completely as warranted.
 18

19 First, Epic accuses Apple of engaging in a “massive campaign” of over-designation of
 20 privilege. The evidence does not support these allegations, and they are untrue. Apple instructed
 21 the reviewers during the first phase of the document production to make good-faith assertions of
 22 privilege, applying the Ninth Circuit privilege standards. Any notion that Apple calibrated its
 23 privilege review to specifically impede the production of responsive documents is unsubstantiated
 24 and wrong—indeed, that would have required coordination among several major law firms, two
 25 outside consulting firms, and hundreds of outside attorneys.
 26

27 What the facts instead show is that Apple invested significant resources into timely
 28 reviewing and producing relevant documents. Owing to the high volume of documents under
 JOINT STATUS REPORT RE
 SPECIAL MASTER REVIEW

1 review and the short timeframe for production, Apple enlisted several hundreds of reviewers to
 2 review these and tens of thousands of other documents (ultimately more than 1 million in total).
 3 Apple's outside counsel was able to quality control check only a relatively small percentage of *all*
 4 of those good-faith review decisions (including both documents withheld for privilege and
 5 documents *not* withheld for privilege). Those documents concern difficult issues of injunction
 6 compliance, regulatory investigations and responses, and other legal proceedings related to the App
 7 Store around the globe. Attorneys appeared on thousands of the documents as a result, making the
 8 privilege determinations more complex than many other document productions concerning purely
 9 business issues.
 10

11 The current downgrades are the result of review by a small (~100) group of attorneys,
 12 undertaking a document-by-document review of only the issue of privilege and applying this
 13 Court's subsequent orders and additional guidance. All of this review was done pursuant to a
 14 protocol agreed to by Epic and entered as an order by the Court. Apple has adhered to that protocol
 15 and reviewed tens of thousands of documents in a matter of weeks. As the statistics above indicate,
 16 the Special Masters have overwhelmingly upheld Apple's privilege assertions.
 17

18 *Second*, Epic's speculation and allegations about a deliberate change in review standards
 19 midstream are baseless. Apple did not instruct its ~100 privilege reviewers to increase (or decrease)
 20 the frequency of their privilege assertions following the status conference with the Special Masters
 21 on January 13, 2025 or at any other time. Apple always provides iterative guidance to reviewers
 22 during a review, but in this case, that iterative guidance consisted largely of advising reviewers
 23 about the kinds of documents the Special Masters were *not* upholding as privileged. Apple made
 24 no intentional effort to change the frequency of its privilege assertions.
 25

26 Nor would it have made sense for Apple to do so. At Epic's insistence, every single
 27 document over which Apple is asserting privilege must be reviewed by the Special Masters. If
 28 Apple were to make an overbroad claim of privilege, that would be rooted out by the Special
 JOINT STATUS REPORT RE
 SPECIAL MASTER REVIEW

1 Masters. Moreover, Apple has known since the beginning of this project that the review by the
 2 Special Masters would be the stopgap. *See Hr'g Tr. 17:20–24* (Dec. 18, 2024). Epic's implicit
 3 assumption that three Special Masters could responsibly review tens of thousands of documents in
 4 a matter of weeks—essentially the same project Apple employed ~100 reviewers to complete—has
 5 no basis in reality or this Court's orders. That would be true under any of Apple's periodic estimates
 6 of the likely review population.

7 Epic speculates that Apple changed its review protocol because Apple “knows” its privilege
 8 assertions will not be reviewed by the Special Masters. Apple did not change its review protocol
 9 and has no such “knowledge.” Rather, Apple is under a Court order to submit each and every
 10 document over which it claims privilege to the Special Masters for review. *See Dkt. 1092.* That
 11 was the protocol *Epic* proposed and to which Apple agreed. To the extent Epic is saying it now
 12 intends to abandon that protocol, this filing is the first time it has made that suggestion. Unless and
 13 until the Court relieves the Special Masters of their obligations—and to be clear, Apple has no
 14 intention of requesting that it do so, regardless of when the evidentiary hearing resumes—each and
 15 every one of Apple's privilege assertions will be reviewed by a disinterested Special Master. The
 16 statistics so far strongly indicate Apple's privilege assertions will be upheld in significant part.

17 Epic notes various estimates Apple made near the end of the review about the total
 18 population of privileged documents. Apple provided a rough estimate on January 13 of the number
 19 of documents it anticipated would be produced *after* its fourth production to the Special Masters.
 20 While repeatedly caveatting the estimate, Apple estimated an additional 8,000 to 10,000 documents
 21 *after* the fourth production (i.e., on top of the 10,030 documents produced through the fourth
 22 production). *See Hr'g Tr. 74:16–75:6* (Jan. 13, 2025). After Epic's counsel repeatedly pushed
 23 back, Apple's counsel estimated that it would be *at* least 17,000 documents in total. *See id.* at 79:5–
 24 17. Apple cannot be faulted for giving its best estimates in real-time based on the knowledge it had
 25 available during the conference.

1 *Third*, Epic now asserts (for the first time in this submission) that Apple may have
2 strategically pushed some documents to the back of the re-review queue. Again, that is not true
3 and there is no evidence for it. Apple did not sort documents for review based on custodian, subject
4 matter, or any other metric. The only instruction it gave its vendor was to keep “family” member
5 documents (e.g., emails and their attachments) together for purposes of the review. It is not even
6 clear to Apple how it *could* have organized the review in the way Epic speculates, given the large
7 number of custodians and the variety of documents in the production. If the suggestion is that
8 Apple’s counsel searched through all 54,000 documents, identified a few thousand that were of the
9 greatest interest, and segregated them from the population, that did not happen and there is
10 absolutely no evidence to substantiate that claim.

12 The statistics Epic presents are highly misleading. Epic notes that of the documents with
13 Alex Roman, Phil Schiller, or Carson Oliver as a custodian over which Apple has maintained
14 privilege, between 60–70% appear on the final log. But because Apple reviewed a substantially
15 higher number of documents in the final week, the final privilege log represents approximately
16 57.8% of *all* documents over which Apple maintains privilege—regardless of custodian. Epic
17 conspicuously omits any statistics as to Matt Fischer, the fourth witness from the hearing, whose
18 allocation of documents in the final privilege log (~56.1%) was in line with the overall distribution
19 of privileged documents. The percentages Epic cites for three particular custodians are therefore
20 not evidence of any strategic ordering as to particular custodians.

22 *Fourth*, Epic identifies three documents in Apple’s final privilege log that it claims may not
23 be privileged. The process for objecting to documents over which Apple has asserted privilege is
24 set forth in the Protocol, and there is no process in place for either party to short-circuit both the
25 Special Masters *and* Judge Hixson in order to pursue immediate review from Your Honor. Based
26 only on a quick review, though:

- 1 • Entry No. 1470 is a slide deck for internal presentation whose speaker notes indicate
2 it was delivered in substantial majority by in-house counsel and that includes
3 numerous comments from another in-house counsel.
- 4 • Entry No. 4706, as Epic admits, is an email sent to Apple's General Counsel, and as
5 Apple has briefed before Judge Hixson, the fact that legal advice is sought on a
6 business matter does not render a communication non-privileged.
- 7 • Entry No. 7796 appears to have already been produced to Epic from two other
8 custodians (APL-EG_11391659 and APL-EG_11467957). Had Epic raised this
9 with Apple prior to the joint submission, Apple could have produced this version as
10 well (it not unusual for the same document to receive different treatment from
11 different reviewers).

13 Epic also provides an Exhibit identifying 100 additional documents it contends may not be
14 privileged. Epic did not provide this list of documents to Apple until 10:20 AM PT. Apple has had
15 no opportunity to review the list at any level of detail. But in any event, as Apple has noted, the
16 parties have an agreed-upon Protocol, developed jointly by the parties and entered by the Court as
17 an order, for evaluating Apple's privilege claims. Even if Epic might be dissatisfied with the high
18 rate at which the Special Masters are upholding Apple's privilege assertions, that is no basis to now
19 jettison the process that the parties agreed to and the Court accepted.
20

21 Epic's suggestion that the Court's "spot check" include 100 documents curated by Epic is
22 not tenable—looking only at the documents identified by an opposing party is not a "spot check"
23 and will tell the Court nothing about Apple's overall privilege efforts. In a recent status hearing,
24 one of the Special Masters also expressed concern whether any "spot check" would be effective
25 because "[t]here are different kinds of groupings and I don't know how you would select randomly
26 different things to give you a sampling to rule on." Hr'g Tr. 17:8–16 (Jan. 24, 2025). If Epic would
27
28

1 like to brief the newly identified documents on an expedited basis before Magistrate Judge Hixson
2 and receive a ruling as to *those* documents, Apple is willing to do so (and that is the normal way in
3 which privilege disputes are handled). But again, Epic never raised any of those documents before
4 the morning of January 31, just hours before this submission is due. In any event, if Epic seeks to
5 provide exemplars for the Court as illustrative of Apple's privilege re-review, then Apple would
6 request the same opportunity.

7 Finally, Epic renews its request that the Court declare all of Apple's privilege assertions
8 waived. This Court already indicated it was not inclined to issue that relief. *See* Hr'g Tr. 23:5–11.
9 There are no new facts since then to justify such relief now. Epic's speculation about some change
10 in Apple's review standards or a strategic ordering of documents is both unsubstantiated and wrong.
11 In fact, at the hearing, counsel for Epic was clear: "The issue is not the rereview." *Id.* at 10:20. At
12 the very least, the Court should receive full briefing before ordering such a drastic remedy.

1 Dated: January 31, 2025

Respectfully submitted,

2 By: /s/ Yonatan Even

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1 Dated: January 31, 2025

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1 **E-FILING ATTESTATION**

2 I, Yonatan Even, am the ECF User whose ID and password are being used to file this
3 document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the
4 signatories identified above has concurred in this filing.

5

/s/ Yonatan Even
6 Yonatan Even

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